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No. _____

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IN THE

Supreme Court of the United States

October Term, 1984

CORNELIUS C. SCOTT, III,

Petitioner,

v.

ADELINE CLAUDIA SCOTT,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOURTH APPELLATE DISTRICT STATE OF CALIFORNIA

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REASONS FOR DENYING THE WRIT

The decision of the Court of Appeal of California in this matter properly reflects both the law of that state and the intent and letter of the Federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (hereinafter "FUSFSPA"). In enacting FUSFSPA, Congress clearly did not mean to have state courts governed by a substantive federal statute:

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning on or after June 25, 1981 either as property solely of the member or as property of the member and his spouse *in accordance with the law of the jurisdiction of such court*." (Emphasis added.)

That portion of FUSFSPA specifically leaves the question of division to the states and sets a policy of non-interference in the manner of division. This is in accord with this Court's own long-standing view that family law and property law matters are of peculiarly local concern and that questions of the appropriate disposition of such property upon dissolution of a marriage should be left to the control of the States. *In re Burrus*, 136 U.S. 586, 593-594, 34 L.Ed. 500, 10 S.Ct. 850 (1890); *United States v. Yazell*, 382 U.S. 341, 349, 353, 15 L.Ed.2d 404, 86 S.Ct. 500 (1966).

FUSFSPA can in no way be interpreted as a statement of substantive law, as petitioner suggests. The very title given to 10 U.S.C. section 1408 discloses the thrust of the statute: "Payment of retired or retainer pay in compliance with court orders." The title suggests that it deals primarily with the *manner* in which payment may be made, pursuant to the statute, by the government itself.

Nowhere does FUSFSPA limit the ability of a state court to divide retirement pay, *which has vested*, if the service member decides to remain on active duty. Petitioner repeatedly refers to division of "active duty pay." This case does *not* involve active duty pay and respondent has never suggested dividing active duty pay.

A vested military retirement fund is a community property split under the laws of the State of California (Calif. Civ. Code section 4800). 10 U.S.C. section 1408(c)(1) specifically allows division of

that property by a state by court order pursuant to the laws of that jurisdiction.

The California Court of Appeal correctly characterized FUSFSPA as a "procedural" rather than "substantive" law in its decision:

> "However, FUSFSPA expresses only a general congressional intent that military pensions be treated similar to other pension [*sic*] under applicable state community property law."

The Court of Appeal properly relied upon the California Supreme Court decision in *In re Marriage of Gillmore*, 29 Cal.3d 418 (1980). In that case the Court followed a line of state cases which reasoned as follows:

> "Under the cases and statutory law, Earl cannot time his retirement to deprive Vera of an equal share of the community's interest in his pension. It is a "settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse. (*In re Marriage of Stenquist* (1978) 21 Cal.3d 779, 786 [148 Cal.Rptr. 9, 582 P.2d 96]. See also *Waite v. Waite, supra*, 6 Cal.3d at p. 472; *In re Marriage of Peterson, supra*, 41 Cal.App.3d at pp. 650-651.)" (*Id.* at p. 423.)

Petitioner's argument that forcing division when the member is still on active duty is tantamount to compelling retirement, in contravention of section 1408(c)(3), is meritless and speculative. Petitioner himself is still on active duty. Further, he would no more be compelled to retire by division of this property than by dividing any other type of property.

A similar contention was raised in *In re Marriage of Gillmore, supra*, and was discussed at page 427:

> "Earl's claim that he is being forced to retire misses the point. He is free to continue working. However, if he does so, he must reimburse Vera for the share of the community property that she loses as a result of that decision. . . . His situation is not unlike that faced by a couple ordered to divide a house that they own as community property. If one of the spouses choose to keep the house, he or she is free to use separate property to purchase the other's interest. Here, Earl must divide his retirement benefits with Vera. If he does not wish to retire, he must pay her an amount equivalent to her interest."

While Respondent agrees that FUSFSPA sets out *conditions* under which all states must abide it seems only too obvious that Congress would specifically have provided that a retirement fund could not be divided until the member actually retires if it meant to do so. To the contrary, it has left the decision to the state courts.

Petitioner's second contention that "disposable" retired or retainer pay means that "net" rather than "gross" amount he would receive - poses considerable practical difficulties, if true. First, a trial court cannot know the actual deductions the member will incur on future retirement pay. Second, since respondent must include her payments in her gross income, subjecting her to tax liability, she would suffer double taxation if those taxes were first deducted before division. Further, Petitioner is freed of any tax liability on Respondent's share of the benefits remitted to her.

While it is true that Section 1408(a)(4)(A-F) specifies certain deductions, only local, state and federal income tax were applicable under the facts of this case (subsection (a)(4)(D)). It also specifies that the court must subtract those amounts only "if the

withholding of such amounts is authorized or required by law. . . ." Clearly there will be no withholding for taxes from unreceived monies, since taxation will be deferred until such time as the member withdraws the funds. This section was included *in the event* that such amounts are presently being withheld. If they are not, that subsection is clearly inapplicable, just as the other subsections may not apply in the individual case.

CONCLUSION

The California court has properly functioned within the limitations imposed by the federal statute and has implemented state law in the manner authorized by FUSFSPA. The questions raised by petitioner are ones of state law rather than federal rights. As pointed out, FUSFSPA leaves its implementation to the states themselves. These issues are also ones which should be left to a state-by-state analysis.

DATED: October 26, 1984

Respectfully submitted,

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